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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/088,980	03/26/2002	Kevan Hatchman	MPD309	6604

7590 03/23/2006  
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EXAMINER
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METZMAIER, DANIEL S

ART UNIT	PAPER NUMBER
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1712

DATE MAILED: 03/23/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/088,980	<b>Applicant(s)</b> HATCHMAN ET AL.	
	<b>Examiner</b> Daniel S. Metzmaier	<b>Art Unit</b> 1712	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 27 December 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-6 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |                                                                                                                        |                                                                                         |
|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                            | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____                                                |

**DETAILED ACTION**

Claims 1-6 are pending.

***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claim 1-3 is rejected under 35 U.S.C. 102(b) as being anticipated by Henkel KGAA, FR 2,759,607 A (hereafter Henkel), as evidenced by Derwent Abstract AN 1998-323821. Henkel (page 3, lines 4-22; page 4, line 7, to page 5, line 9; page 6, line 16, to page 7, line 10; page 14, lines 3-33; and table 1; and Derwent Abstract) discloses pearlescent concentrates employing ethylene glycol distearate, anionic sulfates, and coemulsifiers and characterizes said compositions as lamellar gels having an isotropically clear phase enabling the excellent pearly luster rather than a cloudy appearance (see Derwent Abstract). The disclosed compositions would have inherently provided the protolamellar structure based on the components and the characterization of the compositions as lamellar and providing an excellent pearly luster in the concentrate.

3. Claim 1-3 is rejected under 35 U.S.C. 102(b) as being anticipated by Lion Corp, DE 36 17 306 A (hereafter Lion), as evidenced by Derwent Abstract AN 1986-320274. Lion (claims 1, 3, and 4; page 5, lines 34, to page 6, line 17; page 7, line 26, to page 8, line 7; page 9, lines 4-6; page 10, line 33, to page 11, line 15; page 12, lines 7, to page

Art Unit: 1712

14, line 15; example 1; table III; page 18, lines 1-19; examples 19, 20; table IV; and Derwent Abstract) discloses pearlescent concentrates employing ethylene glycol distearate, anionic sulfates, and coemulsifiers and characterizes said compositions as having an isotropically clear phase enabling the pearly luster appearance (see Derwent Abstract). The disclosed compositions would have inherently provided the protolamellar structure based on the components and the characterization of the compositions as lamellar and providing an excellent pearly luster in the concentrate.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Art Unit: 1712

6. Claims 3-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Horiuchi et al, US 4,486,334, in view of Hawkins, US 5,952,285, and Albright & Wilson LTD, AU-A-16451/95.

Horiuchi et al (abstract, examples, and claims) disclose aqueous pearlescent concentrate compositions comprising 3 to 45 wt% of a pearlizing agent including ethylene glycol distearate, and 30 to 50 wt% of sodium polyoxyethylene lauryl ether sulfate as a middle phase ( $M_1$  phase) liquid crystals. Horiuchi et al (column 3, lines 46 et seq; examples; and claims) discloses the formation of the middle phase liquid crystals by dispersing the pearlescent agent above the melting point (i.e., 50 to 80° C) followed by cooling to form the pearlizing agent. Horiuchi et al (column 4, lines 6 et seq) further teaches the specific surfactant concentration can be determined by the limitation of the pearlizing agents, which can be solubilized in the micelles at a concentration of 3 to 45 wt% of pearlizing agent.

Horiuchi et al differs from the claims in the further addition of electrolyte, an explicit disclosure of the pearlizer particle size and the particular concentration ranges claimed.

Hawkins (abstract; column 7, lines 54 et seq) discloses the addition of electrolyte to middle phase liquid crystalline ((hexagonal or cubic symmetry) resulting in an pourable optically isotropically liquid composition. Hawkins (column 20, lines 6-10; and column 24, Table II) teaches chloride salts and exemplifies 1 wt% of sodium chloride.

Hawkins (column 17, lines 29 et seq) further teaches increasing the cloud point of surfactants by the addition of small amounts of sodium chloride.

Albright & Wilson further teach the formation of pearlescent concentrate compositions. Albright & Wilson (page 2 and examples) discloses ethylene glycol mono- and distearate mixtures as pearlizing agents. Albright & Wilson (claims 14 and 15 and figures) discloses the particles size for said pearlizing agents in the suspensions are that at least 90% of the particles are 5 to 20 microns.

These references are combinable because they teach surfactant compositions having liquid crystalline structures and modifications thereof by varying concentrations and materials. It would have been obvious to one of ordinary skilled in the art at the time of applicants' invention to add sufficient sodium chloride to the compositions of Horiuchi et al for the advantage of forming an optically isotropically liquid composition and the added advantage of handling ease esthetic appearance of the concentrates.

The particles sizes would have been obvious to one of ordinary skilled in the art at the time of applicants' invention as conventional sizes shown in the Albright & Wilson reference. It would have been obvious to one of ordinary skilled in the art at the time of applicants' invention to vary the concentrations as a point of law. See also MPEP 2144.05(I) wherein it sets forth, "A *prima facie* case of obviousness exists where the claimed ranges and prior art ranges do not overlap but are close enough that one skilled in the art would have expected them to have the same properties. ***Titanium Metals Corp. of America v. Banner***, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985)."

7. The remaining references cited in the search report as X references for claims 1-3 are considered cumulative to the references relied on in the above rejections over claim 3 or 3-6, respectively.

***Response to Arguments***

8. Applicant's arguments filed December 27, 2005 have been fully considered but they are not persuasive.

Applicants (page 6) assert Henkel as evidenced by Derwent '821 lacks a recitation of a protoilamellar phase. This has not been deemed persuasive sine the Henkel compositions comprise isotropic compositions that otherwise read on the claims. Since a compound or composition and all of its properties are generally inseparable, (*In re Papsech*, 315 F2d. 381, 137 USPQ 43, (CCPA 1963)) said property would have been expected in the claimed compositions. Applicants characterize the isotropic character as an indication of protolamellar properties. Attention is directed to page 2, 2<sup>nd</sup> full paragraph of the instant specification.

Applicants (page 60) assert the inventive compositions are clear and optically isotropic. The Derwent '821 states the Henkel material has excellent pearly lustre in contrast to the prior art, which is cloudy.

Applicants' further assert their compositions are "typically" less viscous. Applicants arguments appear to be a difference of degree rather than kind. The examiner has presented a prima facie case of anticipation and/or obviousness in accordance with the MPEP. The burden then shifts to applicants to come forward with evidence or sound reasoning to rebut said case. Said burden has not been met. Attention is directed to 2112(III).

9. Applicants (page 7) assert the Lion reference as evidenced by Derwent '274 does not disclose a protolamellar phase similarly to the arguments presented regarding

Henkel as evidenced by Derwent '821. Said arguments have been addressed above and are hereby incorporated by reference.

10. Applicants (pages 7-10) assert the examiner has failed to make out a prima facie case of obviousness because (1) the references do not teach the term protolamellar, and (2) the references do not provide the adequate motivation to combine said references with a reasonable expectation of success. This has not been deemed persuasive for the following reason:

(1) The prefix "proto-" means the earliest, 1<sup>st</sup> formed, having the least amount of specified element or radical. See Websters II, page 947. Said definition allows for some of the "proto-" form. Thus, the compositions would have at least some lamellar phase and be indistinct. To the extent any difference exist, said difference is of degree rather than kind.

(2) The term "protolamellar" is not a term of the art. Applicants present no evidence that said term is a term of the art and that the compositions being instantly claimed are distinct from the compositions of the prior art evidence provided by the examiner. Furthermore and as pointed out above, the compositions of the prior art are the same as the compositions being claimed with the exception of applicants' characterization of the compositions structure.

(3) To the extent the compositions require electrolyte to obtain the asserted structure, claim 3 does not require an electrolyte.



(4) While all the references are directed to pearlescent compositions and/or concentrates, applicant concludes without basis that said references are not combinable.

(5) Lastly, a review of Hawkins (column 19, lines 28 et seq, particularly lines 50-55) teaches the effects of electrolytes as a desolubilizing agent for the surfactant, which can result in the L<sub>1</sub> phase by the salting out effect of the desolubiling effect of salt.

Applicants are adding known ingredients for their art taught function and the desire to add electrolyte to achieve an effect. Attention is further directed to Hawkins at column 17, lines 15-20, wherein Hawkins teaches forming L1 phase compositions and the skilled artisans ability to determine the maximum amount of surfactant that can be added at a given electrolyte concentration without causing cloudiness.

Lastly, since the pearlizing agents are generally insoluble and applicants have not shown nor would the skilled artisan expect much impact on the surfactant structure. A prima facie case of obviousness having been presented and is deemed proper and maintained.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Daniel S. Metzmaier whose telephone number is (571) 272-1089. The examiner can normally be reached on 9:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Randy P. Gulakowski can be reached on (571) 272-1302. The fax phone

Art Unit: 1712

number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Daniel S. Metzmaier  
Primary Examiner  
Art Unit 1712

DSM